In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. [redacted] 51

ARCHIE WILLIAM HILL, JR., Petitioner

vs.

STATE OF CALIFORNIA, Respondent

On Writ of Certiorari to the Supreme Court of the State of California

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Motion for Leave to File a Brief as Amicus Curiae and Brief of the Attorney General of the State of Colorado, the Denver, Colorado Police Department, the International Association of Chiefs of Police, Inc., Americans for Effective Law Enforcement, Inc., and the Law Enforcement Legal Unit, Inc., as Amicus Curiae in support of Respondent.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED
CASES

ARTICLES

MISCELLANEOUS

RULES

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Attorney General of the State of Colorado, the Denver Colorado Police Department, the International Association of Chiefs of Police, Inc.; Americans for Effective Law Enforcement, Inc.; and the Law Enforcement Legal Unit, Inc. respectfully move the Court for permission to file this brief as Amicus Curiae

INTEREST OF THE AMICUS CURIAE

Each of the parties joining in this brief as Amicus Curiae has a specific and vital interest in the effectiveness of law enforcement within our constitutional framework.

1. The Attorney General of the State of Colorado, the Honorable Duke W. Dunbar, is the chief legal officer of that state and, as such, is concerned with the effectiveness of the state and local law enforcement agencies throughout Colorado.

2. The Denver Police Department, George L. Seaton, Chief of Police, is the largest police department in Colorado, responsible for enforcing the law in a city of over half a million population; as such, the Denver Police Department is directly affected by the decisions of this Court in the area of the criminal law.

3. The International Association of Chiefs of Police, Inc., (IACP) represent 5,751 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP has nearly 8,000 members and an executive staff headed by Quinn Tamm, Executive Director. The IACP has taken the lead in the rapid strides that have been taken towards the professionalization of the police of this country through training, through the establishment of professional standards, and through consultation with police departments. The IACP is committed to the principle that a direct function of police professionalization is the knowledge of, and adherence to the law by the police. In this context, the IACP, in July of 1970, established the IACP Police Legal Center in conjunction with the Police Legal Advisor Program of Northwestern University Law School. One of the purposes of the Police Legal Center is to make information concerning developments in the criminal law available to

its membership. Thus, the IACP has a direct interest in this area of police professionalization, while at the same time it offers to the Court its expertise in practical police problems.

4. Americans for Effective Law Enforcement, Inc. (AELE) represents the concern of the average citizen with the problems of crime and with police effectiveness. AELE is a not-for-profit, non-political, non-partisan organization incorporated under the laws of Illinois with chapters in Colorado, Oregon and Oklahoma. Professor Fred E. Inbau of the Northwestern University School of Law is the national president. AELE has appeared before this Court as Amicus Curiae in the case of *Terry v. Ohio*, 392 U.S. 1.

5. The Law Enforcement Legal Unit, Inc. (LELU), is a non-political, not-for-profit national association of Police Legal Advisors which has recently been determined to be tax exempt. Police Legal Advisors, are attorneys, (in many cases they are also policemen), who serve as house counsel to police departments, rendering advice to the officers as to the proper procedures to be followed in such areas as arrest, search and seizure, interrogations and other aspects of the criminal law. There are currently 68 Police Legal Advisors working in 42 law enforcement agecnies in this country. Police Legal Advisors are concerned with interpreting the decisions of this Court to the police, often in an on-the-street situation, in order that the police may act with maximum effectiveness consistent with such decisions.

Thus, Amicus Curiae represents a line police department, a chief state legal officer, professional organizations of police chiefs and police attorneys, and citizens concerned with the effectiveness of law enforcement. The interest of these parties lies in presenting to the Court a police viewpoint taken in a practical rather than a theoretical context. We seek to articulate the very real problems that confront

the police in critical areas of the law, in order that this Court may weigh these problems in deciding cases which will have a vital impact on the effectiveness of the police.

The approach taken herein, a direct articulation of a police perspective to this Court by the police themselves, or by spokesmen for the police, has rarely been taken before.[1] It is highly necessary that it be taken. As has been stated by a distinguished federal jurist:

> [the courts] must decide the particular case before them, and they must decide it *without any knowledge* of police requirements, with little understanding of how the protection of individual rights may be affected, *and surely with no information about the far reaching effect their decision may have on law enforcement generally, and the havoc their dicta may cause.*[2] (emphasis added)

It is this "gap" of knowledge and information of police requirements that we seek to fill. Amicus Curiae feels strongly that the police have too long been silent when cases of vital significance have come before this Court; the Court has a right to know the police side of such cases, and the police have a duty to articulate their views. This brief will attempt to accomplish this.

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[1]The police viewpoint was presented to this Court in an Amicus Curiae brief filed by Americans for Effective Law Enforcement in the case of **Terry v. Ohio**, 392 U.S. 1 (1968), and in an Amicus Curiae brief filed by the Colorado Attorney General and the Denver Police Department in support of the California Attorney General's Petition for Rehearing in the case of **Chimel v. California**, 395 U.S. 752, (1969).

[2]Chief Judge J. Edward Lumbard of the Second Circuit Court of Appeals in "New Standards for Criminal Justice," appearing in the May 1966 issue of the Journal of the American Bar Association, page 432.

SUMMARY OF ARGUMENT

Amicus Curiae supports the position taken by respondent's brief on original argument in the instant case as to all of the questions presented therein. This brief, however, deals with only one of the issues in the instant case, respondent's contention that the warrantless search of petitioner's apartment was reasonable, even when judged by the standards of *Chimel v. California,* 395 U.S. 752. Respondent bases this contention on the fact that in the instant case the "exigencies of the situation" made it "reasonably impracticable" for the police to procure a search warrant before going to petitioner's apartment to arrest him. (Respondent's brief on original argument, pages 34 through 39.) The circumstances in the instant case which are claimed to have created thhis exigency include: the unavailability of an issuing magistrate; the fear that the arrest of two of Hill's confederates in the commission of a robbery would alert him that the police were seeking him; and, the necessity to arrest Hill before he could perpetrate other crimes. Respondent cites language from prior decisions of this Court, *Trupiano v. United States,* 334 U.S. 699, *McDonald v. United States,* 335 U.S. 451, and *Terry v. Ohio* 392, U.S. 1, language cited with approval in *Chimel v. California,* supra, as authority for the position that a search may be reasonable, even though made without warrant, if, under the circumstances, it was reasonably impracticable to procure a search warrant. (Respondent's brief pages 34 through 36.)

Amicus Curiae, using respondent's contention with regard to the instant case as a point of departure, urges the Court to examine the broader question of exigent circumstances as applied to police work generally. This issue is of critical importance to the police in view of *Chimel v. Cali-*

fornia, supra, which drastically reduced the permissible scope of a search of premises incident to a lawful arrest.

The holding in Chimel is apparently based in large measure on the fact that, in that case, it was clearly practicable to procure a search warrant prior to Chimel's arrest. This Court's recent holding in *Vale v. Louisiana,*——U.S. ——, 7 CrL 3130, June 22, 1970, reinforces the proposition that the practicability of procuring a search warrant prior to the arrest of the suspect in each case was the reason that the arrest-based searches in *Chimel* and *Vale* were found to be unlawful. If this construction of the *Chimel-Vale* rationale is correct, Amicus Curiae is in complete agreement. For both legal and practical reasons the police should, *whenever practicable,* procure search warrants before making searches.

The problem for today's policeman lies in the fact that, in many cases, it really is impracticable to procure a search warrant prior to making an arrest; he needs to know *when* a warrantless search will be permissible. The problem arises in cases in which an officer reasonably believes that a delay in making an arrest, while a search warrant is being procured for the premises on which the arrest will take place, may result in the escape of a suspect, the destruction or disposal of evidence, or increased danger to the officer or third persons. If he waits for a search warrant the object of the search may be frustrated; yet, if he proceeds without a search warrant, he may be second-guessed by a reviewing court as to his determination that an exigency actually existed.

Guidelines are needed to clarify for the police the circumstances under which the exigencies of the situation will justify a warrantless search. Six examples of practical police problems are presented in this brief in order to

demonstrate to the Court the need for realistic guidelines for the police in this area.

Two of these cases, homicide cases, illustrate the necessity for the police to make prompt arrests of persons wanted for crimes of violence; but in each case described, the prompt arrest alerted persons on the premises, other than the arrestee, to dispose of evidence against the arrestee during the period in which the police, adhering to *Chimel's* mandate, were securing a search warrant.

Another of the cases described deals with an arrest situation in which officers, again mindful of *Chimel's* limitations on arrest-based searches, did not search the arrestee's house. A sister of the arrestee went into another room and an officer followed her in time to seize a fully loaded pistol from the top of the dresser in that room. This case illustrates the fact that weapons in a room, other than that in which the arrest takes place, can constitute a real danger to an officer, yet *Chimel* offers no guidelines for dealing with this problem.

Two of the described cases illustrate how a judge's rigid adherence to the search warrant requirement can second-guess officers despite the exigencies of the situation. In one case, narcotics were being consumed in the officer's sight, yet his warrantless entry and search was subsequently ruled unlawful because no search warrant was secured. In the other case, weapons seized from an automobile during the height of a riot, where every officer was needed on the street, were suppressed because no search warrant was used. In the final case the unavailability of an issuing magistrate is discussed in light of *Chimel*.

These cases are presented in order to document the *need* for guidelines; Amicus Curiae then offers suggested guidelines for the Courts consideration. The guidelines

basically seek to clarify and define those "exigent circumstances" which make it "reasonably impracticable" to procure a search warrant: danger to the officer or to others, destruction or disposal of evidence, flight or escape of a suspect, the unavailability of an issuing magistrate, and other exigencies such as a riot situation. In any case in which an officer seeks to justify a warrantless search of premises he would, under the suggested guidelines, have to present to a reviewing court *facts* which prove *both* probable cause to search and the existence of the exigency which made it impracticable for him to procure a search warrant.

Thus, under the suggested guidelines, we do not urge an unfettered discretion in the officer; the reviewing court is still the final arbiter. Nor do we urge a drastic departure from *Chimel;* rather we ask a realistic appraisal by this Court of the fact that in some cases, limited to real exigencies, the necessity for prompt police action should be recognized and clear rules laid down to guide the police in such cases. Authority for the principles expressed in the suggested guidelines is found in decisions both of this Court and in the Federal Circuits.

Amicus Curiae has attempted in this brief to articulate to the Court a factual police viewpoint. We urge the Court to sustain the warrantless search of petitioner's apartment as made under exigent circumstances and to consider the need of the police for realistic guidelines in this area.

ARGUMENT

1. *The Importance of The Instant Case to the Police*

This is a search and seizure case. Of all of the areas of the law which confront the police in their day-to-day activities, search and seizure may well be the most critical. This Court has made it clear that there is a preference for the use of physical evidence against an accused, as opposed to testimonial evidence elicited from the accused himself. *Miranda v. Arizona,* 384 U.S. 436, *Orozco v. Texas,* 394 U.S. 324. Search and seizure is one of the primary means available to the police in their quest for physical evidence; while, at the same time, today's police officer is well aware that if he oversteps the bounds of the Fourth Amendment's proscription against unreasonable searches and seizures, as interpreted by the courts, evidence thus gathered will be inadmissible. *Mapp v. Ohio,* 367 U.S. 643.

Thus, the law of search and seizure is of paramount importance to the working policeman. Justice Tom C. Clark, in one of the most empathetic statements concerning the police ever to emanate from this Court, summed up the police officer's position:

> Every moment of exery day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. *Chapman v. United States,* 316 U.S. 610 at 622, (dissenting opinion).

The instant case is of particular importance to law enforcement because it deals with the issue of the per-

missible scope of a search of premises incident to a lawful arrest. In view of the substantial restrictions on such searches announced by this Court in *Chimel v. California,* 395 U.S. 752, (1969), this area of the law of search and seizure has assumed critical importance for the police. One of the most pressing problems for the police officer on the street is the situation in which exigent circumstances make it reasonably impracticable for him to procure a search warrant, yet prompt police action is called for. There is little or nothing by way of guidelines for proper police action in this area. We urge the Court to examine the question of exigent circumstances and to establish realistic guidelines for the police in this area.

The question of exigent circumstances in the instant case is presented by respondent's contention that the warrantless search of petitioner's apartment was reasonable even when measured by the standard of *Chimel v. California,* supra, because, in the instant case, it was reasonably impracticable for the police to procure a search warrant. (Respondent's brief on original argument, pages 34 through 40.) In this brief, Amicus Curiae addresses itself solely to the exigent circumstances issue, both in the context of the instant case,[3] and in the broader context of the impact of *Chimel v. California,* supra, on police work generally, in those situations in which exigent circumstances dictate rapid police action.

The facts of the instant case have been set forth in detail in respondent's brief (pages 4 through 15). We will

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[3]Respondent's brief on original argument also contends that the arrest of one Miller, whom the police mistakenly believed was petitioner Hill was lawful, (page 19); that the search of petitioner's apartment was reasonable under **pre-Chimel** standards (page 27); and that the new rule announced in **Chimel** should be applied prospectively only (page 40). Amicus Curiae is in complete agreement with, and expresses total support for, respondent's position on each of these questions; however, this brief will confine itself to the question of exigent circumstances under a post-**Chimel** standard.

only briefly summarize them here, as they apply to the issues presented in this brief.

Los Angeles police officers were investigating a vicious robbery and aggravated assault perpetrated by four men. Two of the suspects, Baum and Bader, were arrested two days after the robbery; they advised the police where a third suspect, (Hill) lived, and they further advised the police that proceeds of the robbery and weapons used in the robbery were at Hill's apartment. Within hours of receiving this information, the police proceeded to the apartment named, arrested one Miller (whom they believed to be Hill) in the apartment, and searched the apartment incident to that arrest. This search, made without warrant, produced weapons, part of the proceeds of the robbery and other evidence admitted against petitioner at his trial for the robbery. The reasons given by the police for not procuring a search warrant prior to the arrest were:

—1— The information concerning Hill's apartment was received after court hours and the police would have had to wait at least twelve hours before a search warrant could be procured.

—2— Hill and the fourth suspect, Baca were still at large and could well be engaging in other assaults and robberies.

—3— The arrests of Baum and Bader might become known to Hill and alert him to flee or to dispose of evidence.

—4— To arrest Hill but to delay a search of the apartment until a warrant could be procured might alert the fourth suspect Baca, and permit him to dispose of evidence in the apartment, to which he presumably had access.[4]

[4]A point not raised in respondent's brief, but one which offers further justification for the prompt search of Hill's apartment is that in so searching the police might well have found information as to where Baca, the fourth suspect, might be found.

These facts, respondent contends, created a situation whereby:

> it was not 'reasonably practicable' that a search warrant be obtained, and the 'exigencies of the situation' made it imperative that petitioner be arrested forthwith and his apartment searched incident thereto and without delay. (Respondent's brief page 39).

Respondent's brief, pages 36 through 39, cites as authority for this contention prior statements of this Court that search warrants must be procured "wherever reasonably practicable," *Trupiano v. United States,* 334 U.S. 699, *Terry v. Ohio,* 392 U.S. 1; and that in cases where it is reasonably impracticable to procure a search warrant, and in which probable cause to search exists, a warrantless search may be reasonable, *Chimel v. California,* supra, dissenting opinion. We will not reiterate these arguments at this point, but rather turn from the question of exigent circumstances, as illustrated by the instant case, to the broader question of exigent circumstances as applied to police work generally.

2. *The Problem In Perspective—The Impact of Chimel v. California Applied on The Street*

Chimel v. California, supra, drastically reduced the permissible scope of an arrest-based search of the premises upon which an arrest had taken place. Prior to *Chimel* the law was reasonably settled that an officer who had made a lawful arrest in a house, apartment or building could make a search of that part of the premises that was under the arrestee's control. It was not considered material whether or not it was practicable to procure a search warrant prior to the arrest. *Harris v. United States,* 331 U.S. 145, *United States v. Rabinowitz,* 339 U.S. 56. *Chimel*

changed all of this. In that case this Court narrowed the permissible scope of an arrest-based, warrantless search of premises to that area from which the arrestee might secure weapons or destructible evidence.

In *Chimel* itself, officers procured a warrant for Chimel's arrest in the morning but did not arrest him until the late afternoon of the same day. This court held that the warrantless search of Chimel's entire house incident to this arrest was unreasonable under the Fourth Amendment and reversed his conviction, 395 U.S. 752. It is apparent from the facts of the case that it was reasonably practicable for the police to procure a search warrant prior to Chimel's arrest,[5] and it would appear that this was a major factor, if not the determinative factor, in the Court's decision.

Statements from other opinions of this Court, quoted with approval in the majority opinion in *Chimel*, support the view that the practicability of procuring a search warrant prior to the arrest was an essential element in that decision. The *Chimel* majority opinion, at page 758, quoted from *Trupiano v. United States*, supra:

> It is a cardinal rule that in seizing goods and articles, law enforcement agents must secure and use search warrants *whenever reasonably practicable* . . . (emphasis added).

Again, the Chimel opinion, at page 762, cited the following from *Terry v. Ohio*, supra:

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[5]In fact, respondent's brief at page 36 points out that Chimel was considered a prime suspect by the officers for some **weeks** prior to his arrest.

> . . . the police must *whenever practicable* obtain advance judicial approval of searches and seizures through the warrant procedure . . . (emphasis added).

Further, on the same point, Mr. Justice White, in his dissenting opinion in *Chimel* noted, at page 733:

> The Court has always held, and does not today deny, that when there is probable cause to search and it is 'impracticable' for one reason or another to get a search warrant, then a warrantless search may be reasonable.

Finally, this Court's most recent decision in the area of warrantless searches of premises, *Vale v. Louisiana,* ... U.S. ..., 7 Cr L 3130, (June 22, 1970), reinforces the proposition that the practicability of procuring a search warrant prior to an arrest is the critical factor in the search-incident-to-arrest area as defined by *Chimel.* In *Vale,* officers had procured warrants for Vale's arrest. They proceeded to his house and observed him make a sale of narcotics in front of his house. They arrested him outside of his house, then entered and made a warrantless search of the house. In finding this search unreasonable, the Court noted:

> The officers were able to procure two warrants for appellant's arrest . . . They also had information that he was residing at the address where they found him. There is thus no reason, so far as anything before us appears to suppose *that it was impracticable for them to procure a search warrant as well.* 7 Cr L 3131. (emphasis added).

From the foregoing it appears that *Chimel,* as reinforced by *Vale,* stands for the premise that a warrantless search of premises, incident to an arrest but extending

beyond the "immediate area" of the arrestee, will be held unreasonable if it had been practicable for the police to procure a search warrant before the arrest was made. If this construction of the *Chimel-Vale* rationale is correct, Amicus Curiae, is in complete agreement with the principle expressed.

Police officers *should* make searches with warrants whenever it is reasonably practicable to do so.[6] This is not only a legal requirement but from a purely practical point of view, an officer is in a much firmer position, as far as any civil liability might be concerned, if he makes a search armed with a command from a court to do so (i.e. a search warrant), rather than when he is acting on his own.

Thus, from both a legal and a practical viewpoint it is unquestioned that officers should conduct searches with warrants whenever reasonably practicable. The problem for the policeman lies in the words "whenever reasonably practicable." *When* is it reasonably impracticable to procure a search warrant; or, phrased another way, what circumstances, arising out of the exigencies of the situation, will make it reasonably impracticable to procure a search

[6]The following figures indicate the extent to which the Denver Police Department has attempted to comply with **Chimel's** mandate. The figures indicate the number of search warrants secured by the Denver Police in 1968, 1969 and the first half of 1970. Broken down by months these figures indicate a dramatic increase in the number of search warrants after June of 1969, the month in which **Chimel** was decided. (Source: Denver District Court Records)

SEARCH WARRANTS ISSUED TO DENVER POLICE OFFICERS

MONTH	1968	1969	1970
Jan.	19	32	75
Feb.	26	22	31
Mar.	13	32	57
Apr.	19	26	82
May	24	29	70
June	28	Chimel 20	68
July	18	37	
Aug.	19	41	
Sept.	16	46	
Oct.	12	41	
Nov.	14	48	
Dec.	26	47	
TOTAL	234	421	383

warrant so that a warrantless search may properly be made? The answer to this question must, of course, be based on the facts of each case; yet the policeman of today —a policeman who, as Mr. Justice Clark has noted, " . . . is anxious to obey the rules that circumscribe his conduct . . . "[7]—has very little by way of guidelines to aid him in answering this question when he is confronted with it on the street.

In many cases, of course, it is crystal clear that it is reasonably practicable for the police to procure a search warrant prior to making an arrest. Thus, in *McDonald v. United States,* 334 U.S. 699, and in *Trupiano v. United States,* supra, officers had had the parties to be arrested under surveillance for weeks. In cases such as these there is no excuse for not procuring a search warrant. In many other cases, however, the practicability of procuring a search warrant is not so clear. The enforcement of the criminal law is not a static or structured thing. The situations which confront police officers in their day to day activities, particularly in the area of search and seizure, often arise without notice, on the spur of the moment, and in circumstances so varied and unforeseeable that it defies the imagination to predict all of the possibilities that might arise. Thus, at any time, an officer may be faced with a situation which requires him to make a decision on the spot whether to enter a given premises and make an arrest at once, or to delay his action until a search warrant can be procured. This is often an extremely difficult decision to make, for he may reasonably believe that if he delays until a search warrant is obtained he may be increasing the danger to himself or to others, or that the delay may well frustrate the object of his search by permitting a suspect to escape or evidence to be disposed of.

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[7]supra, page 9, **Chapman v. United States,** dissenting opinion.

Due to the fact that the problem just described almost invariably arises in the context of an arrest, it was not until this Court decided *Chimel v. California,* supra, that the problem achieved such momentous proportions for the police. Prior to *Chimel,* an officer who felt that he should proceed at once to make an arrest in a given house, apartment, or other building would have been permitted to search that part of the premises under the arrestee's control for contraband, weapons, or evidence related to the arrest. The problems of escape of suspects or disposition of evidence while a search warrant was being procured did not arise, because a search warrant was unnecessary, assuming that the arrest was lawful and the search was otherwise reasonable. *United States v. Rabinowitz,* supra.

Since *Chimel* has been decided this is no longer the case; arrest-based searches of premises are now barred in most cases, so that the officer is often faced with a real dilemma. The officer is on the scene and has the available facts before him. In his best judgment, based on these facts, there may really exist the type of exigency which makes it impracticable for him to procure a search warrant before making an arrest—e.g. the likelihood of danger to himself or to others, the likelihood of the escape of a suspect, or the likelihood of disposal of evidence; yet, if he acts, he runs a very real chance of being "second guessed" by a judge who, in reviewing the officer's on-scene evaluation of the facts, finds that a search warrant should have been secured. In short, the officer needs guidelines as to how to conduct himself in these situations.

It is from this point of departure that we ask the Court to consider some actual cases in which the police have been faced with a situation involving an exigency of some sort. We further request the Court to view these situations realistically and to empathize with the officers faced with

the decision in each case. We cannot ask the Court to go out on the street with the police; we can, however, attempt to bring "the street"—the gut problems of police work—to the Court, and we can hope that these problems will be viewed with understanding.

3. *Specifics—Actual Cases Showing the Problems That Arise "On The Street"*

The following cases illustrate the manner in which unforeseeable circumstances can create an exigency of one kind or another which makes it reasonably impracticable to procure a search warrant, yet in which immediate action by the police is, or reasonably appears to be, necessary.

CASE NUMBER 1: HOMICIDE—DENVER, COLORADO

This post-*Chimel* case involved the murder of a bartender by two young men. The murder weapon was a .22 caliber automatic pistol. Witnesses to the killing described the assailants and their car. Several days later detectives learned that on the night of the murder, uniformed officers had stopped a car similar to that used by the killers and had taken the names and addresses of A and B, the occupants of the car. Photographs of A and B were shown to the witnesses who tentatively identified them as the killers. This investigation was completed by July 12, and on that date, a pick-up for homicide for A and B was placed in the Denver Police Daily Bulletin. On the afternoon of July 12, officers went to A's house. They were told by A's mother that he was not home; after being apprised of the seriousness of the offense, however, A's mother produced him. A told the officers that B was staying at B's mother's house,[8] and A agreed to take the officers to this house. When the officers arrived at B's mother's house, B's mother said that he

[8]This was not the address given by B when he was stopped by uniformed officers on the night of the killing.

was not there; however, an officer who had gone to the side door arrested B in the doorway as he was attempting to escape. The officers were aware of *Chimel,* thus, no search was made of the room occupied by B or of any part of his mother's house. A and B were taken to police headquarters and placed in line-ups. A was not identified, but B was positively identified by several witnesses as being one of the killers. Under the Colorado Rules of Criminal Procedure, in effect at the time, an affidavit for a search warrant to be executed at night had to contain a *positive* statement that the property sought was on the premises to be searched.[9] By the time that the line-ups for A and B were completed, night had fallen. No search warrant could issue for B's mother's house until the next day, because the officers were not positive that any evidence was located there.

The next morning officers secured a search warrant for B's mother's house, seeking a .22 caliber automatic pistol and the clothing worn by B on the night of the murder. When the officers arrived at B's mother's house with the search warrant, B's mother, B's younger brother, and a neighbor lady were present. No weapons were found; but after she was satisfied that only an *automatic* pistol was being sought, B's mother nodded to the neighbor lady who left and returned with a .22 caliber *revolver* that B's mother had given her "for safekeeping" the night before. This weapon was not the murder weapon. In this case the officers simply do not know whether or not B's mother got rid of the murder weapon in the overnight period before a search warrant could be procured. Certainly she got rid of the revolver until she learned that a revolver could not have been the murder weapon, and it is highly likely that *if* the automatic had been on the premises, she would have removed that also.

[9]This was changed on October 1, 1970. Now Colorado Rules of Criminal Procedure Rule 41 specify that a search warrant based on probable cause may be served at any time.

CASE NUMER 2: HOMICIDE—DENVER, COLORADO

X, Y, and X's girl friend, Z, along with several others, "crashed" a party at a private home in the early morning of August 17, 1969. They were told to leave and, in leaving, they exchanged words with other guests at the party. X, Y, and Z went to X's car nearby and got a rifle out of the trunk. A group of the party guests were standing outside of the house and a shot was fired at X's car, whereupon someone in X's car fired eight shots into the crowd, killing the victim.

Detectives were assigned to investigate and, on the morning of August 17th, questioned witnesses who identified photographs of Y as being in the group who crashed the party. At 11:00 A.M. on the 17th, Y was arrested at his home by uniformed officers. Y told the officers that X had done the shooting and that X and Y had taken the rifle into X's house. Y further told the officers that Z, X's girlfriend, another suspect in the shooting, was living with X. Y agreed to take the officers to X's house. As the officers approached, X apparently tried to escape by running out of the back door, but, he was arrested as he ran around the house. Officers entered the house and arrested Z inside of the house. A search of Z's immediate area revealed no weapons. No further search was made. Approximately ten persons were in the house at the time, including X's brother, who became abusive and ordered the officers out of the house. The officers left and called the detectives who procured a search warrant to search the house for the rifle. It took approximately an hour and a half to draft the warrant and find a judge to sign it. During this period, the officers remained outside of the house; but they did not stop or search any persons leaving the house. When the house was

searched pursuant to the warrant, the rifle was gone.

THE DEFENDANT, X, TOLD THE POLICE THAT WHEN HE WAS ARRESTED, THE RIFLE HAD BEEN IN THE HOUSE. The conclusion is inescapable; while the police waited for the search warrant, one of X's friends removed the murder weapon. A pre-*Chimel* search for the weapon incident to Z's arrest in the house would doubtless have located the weapon; but, the officers, fearing that the *Chimel* rule would make the weapon inadmissible if a warrantless search was made, were forced to take no action to secure this vital evidence until it was too late.

COMMENT:

These two strikingly similar cases illustrate an all-too-common situation that arises on the street. In both cases officers learned where persons wanted for murders were to be found. In both cases, one suspect had been arrested and the likelihood existed that the news of the first arrests would be rapidly relayed to the second suspects enabling them to escape or to dispose of evidence.[10] Further, any realistic evaluation of police work must take into consideration the fact that when the police learn where they can locate persons wanted for murder, or other crimes of violence, delay in the arrest of such persons is not a luxury that either the police or society can afford. There is an overriding duty to the public to take suspects into custody, *and to seize their weapons,* before they perpetrate further crimes.[11]

Thus, the police can not, and should not, delay making arrests in cases such as the two Denver homicide cases or the instant case.

But, once the police enter the premises to make the arrest they have alerted any other persons on the premises to the fact of the arrest. The two Denver cases show clearly

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[10]This was also the situation in the instant case. The police were afraid that the arrests of Baum and Bader would alert petitioner Hill. Supra page 11.

that friends or relatives of the arrestee *will,* in fact, make every effort to dispose of evidence against the arrestee. The question then arises as to just how the police, who have made an arrest on a given premises, can go about preventing the destruction or disposal of evidence by persons remaining on the premises. The authority to detain persons on the premises, persons for whom there is no probable cause for arrest, is questionable at best. As a matter of fact, in his dissenting opinion in *Chimel,* footnote 12, Mr. Justice White suggested that if the officers in that case had remained on the premises and followed Chimel's wife about:

> the invasion of her privacy would have been almost as great as the accompanying search. Moreover, had the wife summoned an accomplice one officer could not have watched them both.

It is one thing to talk glibly about "securing" premises to prevent disposal of evidence by persons thereon; it is quite another to deal with the legal and practical realities of this situation.[12]

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[11]One unfamiliar with police work might suggest that the police merely place the suspect premises under surveillance until a search warrant could be procured. This would be unrealistic in many cases for the following reasons:

—If the suspect was notified of the first arrest by telephone he would have an opportunity to dispose of any evidence on the premises despite the fact that the police had the house under surveillance.

—In some neighborhoods surveillance would be literally impossible in that any type of police activity would be immediately noticed by the residents, the word would be passed that the police were present; and this information would likely reach the suspect.

—In built up urban areas especially, a surveillance of the outside of premises can not guarantee that the suspect could not escape via a window or an exit not visible from any surveillance point.

[12]The Denver Police officers in the second homicide case were asked why they did not stop or search persons coming out of the house. All replied that they did not do so for fear of civil suits in false arrest or assault and battery. It is arguable that a person leaving the premises in such a case could be "frisked" for weapons under the rationale of **Terry v. Ohio,** 392 U.S. 1 (1968). That case, however, dealt clearly with a pat down to protect the officer, rather than with a search for evidence.

In each of the Denver homicide cases described, the police, faced with the highly restrictive language of *Chimel,* elected the "safe" course and procured search warrants for the murder weapons. In the first case it is possible, and in the second case it is definitely established, that this election cost them the murder weapons. In these cases the police, in their eagerness to comply with *Chimel,* "second-guessed" themselves. The point is that they should not have had to *guess* at all. Clear cut guidelines realistically defining exigent circumstances in cases such as these might well have prevented the loss of this vital evidence.[13]

CASE NUMBER 3: NARCOTICS, DADE COUNTY, FLORIDA

The following is an account of a case furnished by Mr. Howard Levine, Police Legal Advisor, Dade County Department of Public Safety, Dade County, Florida.

On October 18, 1969 at approximately 2:40 A.M. in an area of unincorporated Dade County, Florida, in which rapes of white females had occurred on the previous Friday night, a police officer was accompanying a lone white female to her house. As he crossed the back yard of an apartment building with her, he had occasion to look into a ground floor apartment in the building. He observed four white males smoking homemade-type cigarettes in the man-

[13]These two cases were presented once before to this Court in the Amicus Curiae brief of the Colorado Attorney General and the Denver Police Department in support of the California Attorney General's Petition for Rehearing in **Chimel v. California.** On October 13, 1969, this Court denied rehearing without opinion, 24 L. Ed. 2d 124. It should be noted that convictions have been obtained in both cases; in the first case by a guilty verdict, (People v. Moreno, Denver Police Dept. No. 355273) and in the second by a guilty plea (People v. Clements, Denver Police Dept. No. 362311). In each case the conviction resulted because there were numerous eyewitnesses to the killings. The facts of the convictions are immaterial as regards the point of the cases that **Chimel** kept the police from obtaining the murder weapon. If all homicides were committed in front of witnesses their solution would be relatively simple; unfortunately, this is not the case. In most homicide cases the murder weapon is a vital item of evidence, yet the above cases and other cases show how a case such as **Chimel** can create a Constitutional "zone of immunity" around such weapons.

ner characteristic of the marijuana smoker. Also, a fifth white male was injecting a substance into the arm of a Negro male. In addition, the police officer, who had been trained in narcotics, smelled the distinctive odor of marijuana coming through an open fan vent measuring approximately three feet by three feet.

Based on this information, the Dade County Police Legal Advisor authorized the officer to enter the premises pursuant to the emergency doctrine and on the separate theories that both a felony was being committed in the officer's presence, and that the officer had reasonable grounds to believe that the evidence of that felony was being destroyed. Obtaining a search warrant would have been impractical.

After the officers had entered and secured the premises and had properly advised all of the subjects of their Constitutional rights, each of the subjects individually admitted to possessing and smoking marijuana.

On November 25, 1969, a judge of the Criminal Court of Record of Dade County ordered the evidence suppressed on the grounds that the officers had failed to obtain a search warrant.

COMMENT: This is a case in which the exigency, the known consumption of evidence, would have made even a minimal delay to procure a search warrant clearly impracticable; yet a judge suppressed the evidence because no warrant was secured. This is a classic example of judicial "second guessing," not only of the police officer but of a Police Legal Advisor[14] to whom the officer had turned for advice. Cases such as this appear to penalize an officer's alertness and initiative in the performance of his duties. Guidelines from this Court are clearly necessary in light of such rulings.

CASE NUMBER 4: DANGER TO THE OFFICER, DADE COUNTY, FLORIDA

The following case was described by Mr. James Jorgenson, Police Legal Advisor, Dade County Department of Public Safety, Dade County, Florida.

This case involved a post-*Chimel* arrest of a narcotics peddler in his home. The arrestee's mother and sister were also present. No search of the house was made. The sister stated that she had to go to the bathroom and left the room. Fortunately, an alert officer followed her in time to seize a fully loaded 9 mm automatic pistol from the top of a dresser in a bedroom which the sister had entered. The Dade County officers, of course, cannot be sure whether the sister would have taken up the gun or not; the point is that the gun was there, and the officers, restricting themselves to searching the immediate area of the arrestee, did not secure the gun until the sister entered the room in which the weapon was located.

COMMENT: This case illustrates the fact that, on occasion, the fact of danger, or potential danger, to an officer can create an exigency of its own. This Court has recognized the fact that weapons in the hands of criminals pose a special danger to officers *on the street.* For instance in *Terry v. Ohio,* supra, at footnote 21, the Court pointed out that 55 of 57 officers killed in 1966 died of gunshot wounds. Yet, a firearm in a house or in an apartment can be as dangerous as a gun in the hands of a criminal on the street. An officer who reasonably believes that there may be weapons on a premises where an arrest has taken place should have some leeway to protect himself; yet the language of *Chimel,* read in its most restrictive terms, grants no such

[14]See above: Interest of the Amicus Curiae, Law Enforcement Legal Unit, Inc. page 3, relative to Police Legal Advisors and their functions.

leeway at all. The need for guidelines on this issue is obvious.

CASE NUMBER 5: RIOT, WASHINGTON, D.C.

A riot or civil disorder in which an entire police department is committed to the street can create an exigency of its own. Every man is needed, and time is of the essence in searches for snipers, looters, arsonists, and other violators; and it is particularly necessary to make searches for weapons or explosives as expeditiously as possible. Yet, consider the holding of the District of Columbia Appeals Court in *Leven v. United States*, D. C. Appeals, 6 Cr L 2352 January 15, 1970. That case arose during the April 1968 riots in Washington, D. C. District police officers observed Leven driving about the city in violation of the curfew, in a truck with a shotgun prominently displayed in the cab. The officers told Leven to drive to the police station while they followed him. At the station Leven parked the truck and went inside. One of the officers, who had observed Leven place something under the front seat of the truck before he went into the police station, looked under the front seat and seized two revolvers which were concealed there. The majority of the D.C. Appeals Court ruled that the revolvers should be suppressed because no search warrant for the truck was secured.

COMMENT: Granted that this case involved automobiles rather than premises, there is no reason to believe that a warrantless seizure of weapons from premises would have been treated differently by the majority of the court that ruled in *Leven*. This rigid requirement of a search warrant, and the apparent disregard for the realities of police work in a riot situation evidenced by the majority of the court prompted Chief Judge Hood, dissenting in *Leven*, to state:

> Under the circumstances, I think it most unreasonable and unrealistic to say that the officer, at a time when there was a great shortage of police manpower, should have gone across town seeking a search warrant. 6 Cr L 2353

CASE NUMBER 6: UNAVAILABILITY OF AN ISSUING MAGISTRATE[15]

There are still parts of this country in which a magistrate may simply not be available. This can create an exigency in cases in which there is a pressing need to procure a search warrant. Aspen, Colorado is one example. This mountain ski resort town has one county judge available to issue warrants. When this judge is unavailable the next nearest magistrate is a two hour drive away at Glenwood Springs. During snow storms, however, the roads in that part of the country may be completely impassable; in these cases, if the Aspen judge should be out of town, it would be literally impossible to procure a search warrant; yet the *Chimel* opinion makes no reference to such a situation. Guidelines are clearly needed here.

The foregoing cases have been but a few examples of the practical police problems involved in the area of exigent circumstances. An article appearing in the Notre Dame Lawyer, June 1970, Vol. 45, page 559, entitled "*Chimel v. California*—A Police Response" contains a further, more extensive, enumeration of the ways in which *Chimel* has confronted the police with problems, particularly in the

[15]This example is based on information from Mr. Michael Fitzgerald, Deputy District Attorney, Aspen, Colorado, and on the writer's personal knowledge from consulting with Mr. Fitzgerald on this problem.

area of exigent circumstances and the impracticability of procuring a search warrant.[16]

This section of this brief has attempted to demonstrate specific police problems in a specific area. Common to each of these problems is the lack of guidelines for the police to follow when dealing with such problems. We turn now to our request that the Court establish such guidelines.

4. This Court Is Urged To Establish Realistic Guidelines For The Police In The Exigent Circumstances Area

We ask this Court to provide guidelines for the police, guidelines which will enable them to act properly in their decision-making process, as to when a search warrant must be procured. Justice Clark, supra page nine, has posited the duty of this Court to ". . . lay down those rules with such clarity and understanding that (the policeman) may be able to follow them." The cases presented above indicate the need for guidelines; we urge the Court to provide them.

The cases described above also demonstrate the need for a *realistic* appraisal of the exigent circumstances area. In this context we respectfully offer for the Court's consideration the following suggested guidelines:

1. When a search of premises incident to a lawful arrest extends in scope beyond the immediate area of the person arrested, items seized beyond that scope will ordinarily be inadmissible. *Chimel v. California,* supra.

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[16]The writer of this brief is the author of the law review article cited. The article is cited as informational as to the cases discussed, and not as authority for any of the conclusions contained therein.

2. However, if the state, at a motion to suppress such evidence can show and the reviewing court shall find as a fact, that prior to the arrest:

a) it was reasonably impracticable for the police to procure a search warrant;

and,

b) probable cause to make the search existed, then evidence so seized shall be admissible.

3. Going one step further, those circumstances which would make it reasonably impracticable to procure a search warrant should be clarified and defined. Such exigent circumstances, we submit, could be shown by *specific and articulable* facts[17] which indicate:

a) The reasonable probability of harm to the officers or to third persons while a search warrant is being procured. (This situation is illustrated by case number 4, page twenty-five, supra, in which a loaded gun was available in a room other than that in which the arrest took place.)

b) The reasonable probability of the flight or escape of a suspect while a search warrant is being procured. (This situation is illustrated by the two Denver homicide cases, cases number 1 and 2, supra, pages eighteen to twenty-one).

c) The reasonable probability of the destruction, concealment, or removal of weapons, contraband, or evidence while a search warrant is being procured. (This situation is illustrated by the Dade County narcotics case, case number 3, supra page twenty-three, and the two Denver

[17]Terry v. Ohio, 392 U.S. 1, page 21, where such facts are required to justify a "stop and frisk."

homicide cases, cases number 1 and 2, supra pages eighteen to twenty-one).

d) The unavailability of an issuing magistrate. (This is illustrated by the description of the Aspen, Colorado situation, case number 6, supra page twenty-eight).

e) Other exigent circumstances which would make the procuring of a search warrant reasonably impracticable. (This situation is illustrated by the Washington, D.C. riot case, *Leven v. United States* case number 5, supra pages twenty-six and twenty-seven).

Guidelines such as those suggested would give to the police officer on the street a knowledge of the limits of his authority to make a warrantless search, while at the same time they would advise him of the situations in which he could properly take action without delaying to procure a search warrant.

The authority for the proposition that exigent circumstances may make it reasonably impracticable to procure a search warrant lies in the prior pronouncements of this Court, cited with approval in *Chimel v. California,* and noted herein supra, pages twenty to twenty-two. In addition to this language concerning the practicability of procuring a search warrant, we cite the following from *Trupiano v. United States,* 344 U.S. 699 at 708:

> A search and seizure without a warrant as an incident to a lawful arrest has always been considered a strictly limited right. *It grows out of the inherent necessities of the situation at the time of the arrest.* (emphasis added).

And from *McDonald v. United States,* 335 U.S. 451 at 456:

> We cannot . . . excuse the absence of a search war-

> rant without a showing . . . that the exigencies of the situation made that course imperative.

The suggested guidelines do no more than make explicit the above quoted propositions, for the suggested guidelines specifically require the state to show the facts that created the exigency which made it reasonably impracticable to procure a search warrant.

Further authority for the guidelines, as suggested, may be found in this Court's language in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294 at 298, (1967):

> The Fourth Amendment does not require police officers to delay in the course of their investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential and only a thorough search of the house for persons or weapons could have insured that Hayden was the only man present and that the police had control of all weapons that could be used against them or to effect an escape.

The Federal Circuit Courts of Appeal have upheld warrantless entry and search in circumstances of exigency. Thus, the probability that a suspect would be alerted by the arrest of others was held to justify a warrantless search in *Williams v. United States,* CA8, 260 F. 2d 125, cert. den. 359 U.S. 918; and the probability of destruction or disposal of evidence has been held sufficient to justify such a search. *Ellison v. United States,* CADC, 206 F. 2nd 476; *United States v. Volkell,* CA 2, 251 F. 2d 333, cert. den. 356 U.S. 962, *United States v. Garnes,* CA2, 258 F. 2d 530, cert. den. 359 U.S. 937.

In April of 1970 an *en banc* Circuit Court of Appeals for the District of Columbia sustained a warrantless entry to search for a suspect in a robbery committed some hours

before. *United States v. Dorman,* CADC, No. 21,736, April 15, 1970. In that case the seizure of a stolen suit which was discovered during the search for the suspect was upheld.

We do not suggest that this Court make a broad retreat from *Chimel.* The figures cited supra page fifteen, footnote 6, showing the large increase in the number of search warrants procured by the Denver Police Department since *Chimel* was decided, indicate that in the majority of cases the search warrant procedure can be followed by the police without impairing their efficiency. We are addressing ourselves to those cases, illustrated by the situations described herein, in which a real exigency exists and a rigid adherence to the search warrant requirement may well frustrate the purpose of the police action.

We submit that the suggested guidelines do not give an unfettered discretion to the police, for the police must justify their decision to act without a warrant to a court reviewing this decision after the fact. In making this justification of their actions, they must not only show facts constituting probable cause, but also facts which created the exigency that made the procuring of the search warrant impracticable, and made their prompt action necessary. Further, nothing in the suggested guidelines would justify a warrantless search resulting from mere inertia or laziness on the part of the officer; nor would the delay in procuring a search warrant *per se* justify a warrantless search, for as Chief Justice Burger, then Judge Burger noted in *Chappell v. United States,* CADC, 342 F. 2d 935 at 938:

> That delay may be encountered, however, is not controling on whether a warrant is required; securing a warrant always involves some additional time.

Under the suggested guidelines the police must show specifically *how* the delay in procuring a warrant made their action necessary.

Thus, we do not ask the Court to permit the policeman to be the final arbiter of the existence of the exigency; we do, however, urge the Court to consider the fact that the policeman is on the scene when the situation which is claimed to create the exigency arises and that the policeman is evaluating the situation as it then appears to him, based on his experience. This Court has held, in the context of on-the-street encounters with persons suspected to be armed, that due weight should be given: "... to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experiences." *Terry v. Ohio,* 392 U.S. 1 at 27. We urge the Court to apply the same standard of review to an officer's reasonable inferences as to whether or not an exigency exists, (e.g. whether a suspect is likely to escape; whether it is likely that evidence will be disposed of; or whether the danger to the officer is likely to be increased), bearing in mind that the court reviewing the policeman's conduct will be the final arbiter.

Finally, we cite *Terry v. Ohio,* supra, as an example of a case in which guidelines were set forth by this Court for the exercise of police discretion in another area. The discretion to stop and "frisk" persons suspected of being involved in criminality and suspected of being armed is a broader discretion than that which is sought for the police by the suggested guidelines in the exigent circumstances area. Yet since June 10, 1968, the date of the *Terry* decision, there has been no evidence of police abuse of the discretion reposed in them by that case. The fact that this Court has not granted certiorari in a single "stop and frisk" type case is a clear indication that the police have used their broadened authority in that area with circumspection and

without abusing the trust evidenced by this Court. We believe that the same attitude would be taken by the police with regard to the suggested guidelines defining exigent circumstances.

CONCLUSION

We ask this Court to reach the question of the reasonableness of the search of petitioner's apartment in light of the new standards set down in *Chimel v. California,* supra, and we ask the Court to sustain the search as reasonable having been made under exigent circumstances which made it reasonably impracticableto procure a search warrant.[18] (Respondent's brief pages 34-39).

We further urge the Court to consider the need of the police for guidelines in this critical area and to consider the cases and suggestions presented herein with a view towards the establishment of such guidelines for proper police activity.

Respectfully submitted,

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[18]If this Court should decide, as we urge it to decide, that **Chimel v. California** is to be applied prospectively only the question of the search of the petitioner's apartment in light of **Chimel** would become moot. **Sibron v. New York** 392 U.S. 40, however stands for the principle that if a question is of sufficient importance the Court will consider it despite mootness. We submit that the need of the police for guidelines in the exigent circumstances area is of sufficient importance for the Court to reach the question.